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REC 11/02



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30-7-2003
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NOT FOR PUBLICATION

COMMISSION DECISION

of 30-7-2003

finding that post-clearance entry in the accounts of import duties is not justified in a particular case and authorising the Member States to waive post-clearance entry in the accounts in cases involving comparable issues of fact and of law

(Request submitted by France)

(REC 11/02)

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(Request submitted by France)

(REC 11/02)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code,¹ as last amended by Regulation (EC) No 2700/2000,²

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92,³ as last amended by Regulation (EC) No 881/2003,⁴ and in particular Articles 873 and 907 thereof,

¹ OJ No L 302, 19.10.1992, p.1

² OJ L No 311, 12.12.2000, p. 17

³ OJ No L 253, 11.10.1993, p.1

⁴ OJ No L 134, 29.5.2003, p.1

Whereas:

- (1) By letter of 4 June, received by the Commission on 7 June 2002, France asked the Commission to decide under Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties,⁵ as last amended by Regulation (EEC) No 1854/89⁶ and Article 220(2)(b) of Regulation (EEC) No 2913/92, whether waiver of post-clearance entry in the accounts of import duties was justified and, in the alternative, under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,⁷ as last amended by Regulation (EEC) No 1854/89⁸ and Article 239 of Regulation (EEC) No 2913/92, whether remission of import duties was justified in the following circumstances.

- (2) A French firm purchases goods of Chapters 61 (articles of apparel and clothing accessories, knitted or crocheted) and 62 (articles of apparel and clothing accessories, not knitted or crocheted) of the common customs tariff. As part of this activity, between February 1993 and June 1995 the firm imported textile products into the Community from Laos.

⁵ OJ L 197, 3.8.1979, p. 1.

⁶ OJ L 186, 30.6.1989, p. 1.

⁷ OJ L 175, 12.7.1979, p. 1.

⁸ OJ L 186, 30.6.1989, p. 1.

- (3) Imports into the Community of this type of product originating in Laos qualified for preferential arrangements under the Generalised System of Preferences. Under Article 7 of Commission Regulation (EEC) No 693/88 of 4 March 1988⁹ and Article 78 of the version of Regulation (EEC) No 2454/93 in force at the time, if the products were covered by a Form A certificate issued by the Laos authorities they were eligible for preferential tariff treatment when they were released for free circulation.
- (4) In the case in point, the firm presented Form A certificates issued by the competent Laos authorities in support of its customs declarations for release for free circulation. The French customs authorities accepted the declarations and granted preferential tariff treatment.
- (5) Following an investigation into the conditions under which the Laos authorities issued Form A certificates of origin, carried out in Laos between 13 November and 30 November 1995 by representatives of several Member States and the Commission, it was found that 300 certificates issued for textiles had not been issued by the Laos authorities and 2 700 certificates should not have been issued because the rules of origin had not been complied with. The Laos authorities therefore cancelled the said certificates. The list of false certificates is called List A and the lists of wrongly issued certificates are Lists B, B1, B2 and C.
- (6) The firm used certificates which were later included in lists B, B1 and C, and so were withdrawn by the Laos authorities.
- (7) Since the textile products imported into France were therefore not eligible for preferential tariff treatment, the French authorities then required the firm to pay import duties of XXXX.

⁹ OJ L 77, 22.3.1988, p. 1.

- (8) The firm applied for non-recovery and, in the alternative, remission of the import duties concerned, citing its good faith, the errors which it could not have detected committed by the competent authorities, and failings on the part of the competent authorities.
- (9) In particular, the firm stated that the competent Laos authorities had committed an error in issuing the certificates when they knew that the origin conditions had not been complied with. It further argued that the Commission had committed an error in failing to take action to put a stop to the large-scale import into the Community of goods that were clearly wrongly benefiting from preferential origin arrangements.
- (10) Under Articles 871 and 905 of Regulation (EEC) No 2454/93, the firm stated that it had seen the dossier submitted to the Commission by the French authorities and had nothing to add.
- (11) By letter of 13 November 2002 the Commission requested further information from the French authorities. The French authorities provided the information by letter dated 13 March 2003, received by the Commission on 17 March 2003. The administrative procedure was therefore suspended, in accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, between 13 November 2002 and 17 March 2003.
- (12) In a letter of 10 April 2003, received by the firm on 15 April 2003, the Commission informed the firm of its intention to refuse the request for remission, and stated its reasons.
- (13) By letter dated 14 May 2003, received by the Commission on the same date, the firm expressed its opinion regarding the Commission's objections. It maintained that the competent authorities had committed an error within the meaning of Article 5(2) of Regulation (EEC) No 1697/79 and Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (14) The administrative procedure was therefore suspended, in accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, between 15 April and 14 May 2003.

- (15) In accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to examine the case on 11 June 2003 within the framework of the Customs Code Committee - Section for General Customs Rules/Repayment.
- (16) Under Article 5(2) of Regulation (EEC) No 1697/79 as regards the debts incurred before 1 January 1994, and Article 220(2)(b) of Regulation (EEC) No 2913/92 as regards the debts incurred from 1 January 1994, post-clearance entry in the accounts is waived where the amount of duty legally owed was not entered in the accounts as a result of an error made by the customs authorities themselves which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and observed all the provisions laid down by the rules in force as far as the customs declaration is concerned.
- (17) In the case in point, the granting of preferential tariff treatment for the imports was subject to presentation of Form A origin certificates.
- (18) As already noted, the certificates concerned were cancelled by the Laos authorities.
- (19) Reliance on the validity of such certificates is not normally protected, as this is considered part of the importer's normal commercial risk and therefore the responsibility of the person liable for payment.
- (20) The Court of Justice has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to the expectations.
- (21) In this instance, the exporters declared on the certificates of origin that the goods they covered met the conditions for obtaining the certificates.

- (22) However, as the Court has recently ruled,¹⁰ the fact that the exporters submitted incorrect applications does not rule out the possibility that the competent authorities committed an error within the meaning of Article 5(2) of Regulation (EEC) No 1697/79 and Article 220(2)(b) of Regulation (EEC) No 2913/92. The authorities' behaviour will need to be evaluated in the light of the broader context in which the relevant customs provisions were applied.
- (23) Thus the fact that the exporters confirmed on the Form A certificates that the conditions for obtaining them had been met is not in itself proof that the competent Laos authorities were misled. It is necessary to ascertain whether the exporters made these declarations on the assumption that the competent authorities were acquainted with all the facts necessary to apply the rules in question and whether the authorities, despite that knowledge, raised no objection to the declarations.
- (24) In the case in point, there is evidence to suggest that the competent Laos authorities knew or, at the very least, should have known that the goods for which they were issuing Form A certificates did not fulfil the conditions laid down for preferential treatment.
- (25) Furthermore, the Laos authorities did not make any checks on the exporting firms and placed endorsements on the export certificates after the goods concerned were exported.

¹⁰ *Ilumitrónica* judgment of 14 November 2002, Case C-251/00.

- (26) The firm also blames the Commission for having allowed a situation to persist in which textile products were imported on a scale that did not correspond to the economic situation of Laos. However, this view of the facts fails to reflect what really happened. Only with a certain amount of hindsight, dictated in part by the time needed to prepare the import statistics for 1993 and 1994, could the Commission realise that there were grounds for serious doubts about the way in which Form A certificates of origin were being issued by the competent Laos authorities, and decide to send a mission to Laos to check the situation on the spot. Precisely because of those doubts, the Commission conducted an on-the-spot mission from 13 to 30 November 1995. The mission was particularly effective, since even before it was completed, on 28 November 1995, the Laos authorities sent the Commission lists of the false and invalid certificates. There are therefore no grounds in this case for accusing the Commission of having failed in its duties.
- (27) The circumstances in this case reveal an error on the part of the Laos customs authorities themselves, which could not have been detected by an operator acting in good faith, within the meaning of Article 5(2)(b) of Regulation (EEC) No 1697/79 and Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (28) As the Court of Justice of the European Communities has consistently ruled, when determining whether the firm could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the firm's professional experience and the diligence shown by it.
- (29) In the case in point, the competent Laos authorities issued Form A origin certificates for goods that did not qualify for such certificates for at least the three-year period (end of 1992 to end of 1995) covered by the investigation of 13 November to 30 November 1995. This behaviour confirmed the legitimate expectations of the firm that the certificates issued by the authorities were valid.

- (30) Furthermore, at the time of the events, no notice asking importers to take precautions in the use of Form A certificates of origin issued for the products by the Laos authorities had been published in the *Official Journal of the European Communities*.
- (31) As regards the diligence shown by the firm, there is nothing in the dossier to indicate that the way it concluded its contracts departed from normal commercial practice. Nor were visits to the Laos suppliers by the firm's representatives in connection with the purchase of finished products likely to make the firm aware of the exact origin of the raw materials used.
- (32) It must therefore be accepted that the error of the competent Laos authorities could not have been detected by the firm.
- (33) Moreover, the firm acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (34) Post-clearance entry in the accounts of import duties is not therefore justified in this case. Under these circumstances there is no need to examine the dossier in the light of Article 13 of Regulation (EEC) No 1430/79 and Article 239 of Regulation (EEC) No 2913/92.
- (35) Under Article 875 of Regulation (EEC) No 2454/93, where the circumstances under consideration are such that the duties need not be entered in the accounts, the Commission can, under conditions which it is to determine, authorise one or more Member States to refrain from post-clearance entry of duties in the accounts in cases involving comparable issues of fact and of law.
- (36) At its meeting on 11 June 2003 within the framework of the Customs Code Committee (Repayment Section), the group of experts composed of representatives of all the Member States provided for in Article 873 of Regulation (EEC) No 2454/93 asked that all Member States be authorised to waive post clearance entry of import duties in the accounts in cases involving comparable issues of fact and law.

(37) Such authorisation may be granted to the Member States on condition that it is used only in cases strictly comparable in fact and law to the present case. However, authorisation should also cover applications for waiver of post-clearance entry of duties in the accounts lodged within the legal time limits and concerning import operations relating to Form A certificates issued from the end of 1992 to 28 November 1995, the date on which the letter was sent by the Laos authorities to the Commission giving the list of invalid certificates, where the circumstances in which the import operations were carried out during that period are comparable in fact and law to those that gave rise to the case in point (certificates listed in Lists B, B1, B2 or C). In such cases the importers must have acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXX which are the subject of France's request of 4 June 2002 shall not be entered in the accounts.

Article 2

The Member States are authorised to refrain from post-clearance entry of import duties in the accounts in cases involving issues of fact and of law comparable to the case cited in France's request of 4 June 2002.

The authorisation shall cover requests for waiver of entry of import duties in the accounts lodged within the legal time limits in respect of import operations covered by Form A certificates issued from the end of 1992 to 28 November 1995, where such operations were carried out in circumstances comparable in fact and law to those which gave rise to the requests referred to in the previous paragraph (certificates included in lists B, B1, B2 or C).

Article 3

This Decision is addressed to the Member States.

Done at Brussels, 30-7-2003

For the Commission
Frits Bolkestein
Member of the Commission